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# CERTIFICATE

## Supreme Court of the United States

OCTOBER TERM, 1928 1930

No. 576 5

INDIAN MOTOCYCLE COMPANY

*vs.*

THE UNITED STATES OF AMERICA

ON CERTIFICATE FROM THE COURT OF CLAIMS

FILED DECEMBER 11, 1928

(33,885)

(33,885)

# SUPREME COURT OF THE UNITED STATES

## OCTOBER TERM, 1928

## No. 576

INDIAN MOTOCYCLE COMPANY

*vs.*

THE UNITED STATES OF AMERICA

ON CERTIFICATE FROM THE COURT OF CLAIMS

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JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., DECEMBER 17, 1928

[fol. 1]

IN COURT OF CLAIMS OF THE UNITED STATES

DECEMBER TERM, 1927

No. H-49

INDIAN MOTOCYCLE COMPANY, a Corporation, Plaintiff,

v.

UNITED STATES OF AMERICA, Defendant

Mr. Monte Appel, with whom was Mr. Frederick Schwertner, appeared for the plaintiff.

Mr. Herman J. Galloway, Assistant Attorney General, and Mr. Fred K. Dyar appeared for the defendant.

Before Chief Justice Booth, Judge Moss, Judge Green, Judge Sinnott

STATEMENT OF CASE

The Court of Claims of the United States hereby certifies that the record of the above-entitled case now pending before it discloses the following:

The Indian Motocycle Company of Springfield, Massachusetts, duly filed its petition in the Court of Claims on the 9th day of February, 1927, praying judgment against the United States for $13.83 with interest, as will more fully appear from the petition, a copy of which accompanies this certificate as Exhibit A.

An agreed statement of facts was made by counsel and attorneys representing the respective parties which was filed in the Court of Claims on the 16th day of May, 1927, and is set forth herein. This case came on for trial in the [fol. 2] Court of Claims on October 2, 1928.

There being a division of the court in this case and the court being in doubt, we are of the opinion that the case cannot properly be disposed of without certifying to the Supreme Court certain questions of law involved therein concerning Section 600, Subdivision (2) of the Revenue Act of 1924, and receiving the instructions of said Supreme Court thereon.

Said provision of said Revenue Act is as follows:

"Sec. 600. On and after the expiration of thirty days after the enactment of this Act there shall be levied, assessed, collected, and paid upon the following articles sold or leased by the manufacturer, producer or importer, a tax equivalent to the following percentage of the price for which so sold or leased——

"(2) Other automobile chassis and bodies and motorcycles (including tires, inner tubes, parts, and accessories therefor sold on or in connection therewith or with the sale thereof), except tractors, 5 per centum. A sale or lease of an automobile shall, for the purposes of this subdivision, be considered to be a sale of the chassis and the body."

For the purpose of certification we state the facts to be as follows:

AGREED STATEMENT OF FACTS

It is hereby stipulated and agreed by and between the parties to the above-entitled action that the following facts shall be taken as true, provided, however, that this stipulation shall be without prejudice to the right of either party to introduce other and further evidence not inconsistent with the facts herein stipulated to be taken as true.

1. The plaintiff is a corporation duly incorporated under the laws of the Commonwealth of Massachusetts on or about October 4, 1913, with its principal office and place of business in the City of Springfield, Massachusetts.

2. On or about June 16, 1925, the plaintiff sold and delivered to the City of Westfield, a municipal corporation created by the Commonwealth of Massachusetts, one Indian Motocycle, and the invoice covering the sale showed [fol. 3] the following:

| | |
|---|---|
| 1 Indian Motocycle, Model GE, Motor No. 57 Y 304, Tires Balloon | $247.50 |
| Max Hand Lum. Dial Speedometer Net | 16.00 |
| Extra Chief Ammeter and Switch and Horn | 6.00 |
| Net Extra Balloon Tires, Net Extra | 2.00<br>5.00 |
| Amount of Tax | 13.83 |
| | 290.33 |

# EXHIBIT "A" TO AGREED STATEMENT OF FACTS

## INDIAN MOTOCYCLE COMPANY

FORMERLY KNOWN AS HENDEE MANUFACTURING COMPANY

SPRINGFIELD, MASS. U. S. A.

CABLE ADDRESS, INDIANS SPRINGFIELD, TELEPHONE CONNECTION, A. B. C. FIFTH ED., A. B. C. FIFTH ED. WESTERN UNION, MOSELEY'S, LIEBER'S, LIEBER'S 92

MAKE ALL REMITTANCES PAYABLE TO INDIAN MOTOCYCLE CO.

JUNE 16TH 1925

SOLD TO WESTFIELD POLICE DEPARTMENT
WESTFIELD MASS.

[redacted]

| QUANTITY | FACTORY ORDER NO. G 2867 | CUSTOMER'S ORDER 6525 | LIST | NET | TOTAL |
|---|---|---|---|---|---|
| A 1 | Indian MOTOCYCLE, MODEL CE MOTOR NO. 57Y304 TIRES BALLOON | | | 247.50 | |
| B | " MAX HAND LUM. DIAL SPEEDOMETER NET | | | 16.00 | |
| C | " EXTRA CHIEF AMMETER & SWITCH & HORN | | | 6.00 | |
| D | " SIDE CAR, SERIAL NO NET EXTRA BALLOON TIRES NET EXTRA | | | 2.00 | |
| E | " BICYCLE MODEL SERIAL NO | | | 5.00 | |
| F | AMOUNT OF TAX | | | 13.83 | $ 290.33 |

SHIPPED VIA DELIVERED

TO

MARKS FOR WESTFIELD POLICE DEPT.

# EXHIBIT "B"

## (EXECUTE SEPARATE FORM FOR EACH TAX PERIOD)

TREASURY DEPARTMENT
Internal Revenue Service
Form 843 (Rev.)
Commissioner General, U. S.
January 10, 1925

IMPORTANT
File with Collector of Internal Revenue where assessment was made. Not acceptable unless completely filled in.

**CLAIM FOR**

- ☐ ABATEMENT OF TAX ASSESSED
- ☐ CREDIT AGAINST OUTSTANDING ASSESSMENTS
- ☒ REFUND OF TAXES ILLEGALLY COLLECTED
- ☐ REFUND OF AMOUNTS PAID FOR STAMPS USED IN ERROR OR EXCESS

COLLECTOR'S NOTATION
District
Amount number
Date received
Collector of Internal Revenue

State of MASSACHUSETTS
County of HAMPDEN } ss:

NOTICE TO COLLECTOR
Collector must indicate in block given the kind of claim, except in Income Tax cases.

Date received by Collector of Int. Rev.
Stamps here

TYPE OR PRINT

INDIAN MOTOCYCLE COMPANY
(Name of taxpayer or purchaser of stamps.)
837 State Street
(Residence (or place of business) and number or street, city or town and State.)
Springfield, Massachusetts.
(Residence entered.)

This deponent, being duly sworn according to law, deposes and says that this statement is made on behalf of the taxpayer named, and that the facts given below with reference to said statement are true and complete:

| PERIOD | YEAR |
|---|---|
| From June 1, | 19 25 |
| To June 30, | 19 25 |

1. Business in which engaged Manufacture and sale of motorcycles
2. Character of assessment or tax Excise Tax
(State for or upon what the tax was assessed, or the stamps affixed.)
3. Amount of assessment or stamps purchased ... $
4. Reduction of Tax Liability requested (Income and Profits Tax) ... $
5. Amount to be abated ... $
6. Amount to be refunded (or such greater amount as is legally refundable) ... $ 15.65
7. Dates of payment (see Collector's receipts or indorsements of canceled checks) July 29, 1925
(If statement covers income tax liability, items 8-11, inclusive, must be answered.)
8. District in which return (if any) was filed Boston, Mass.
9. District in which unpaid assessment appears
10. Amount of overpayment claimed as credit ... $
11. Unpaid assessment against which credit is asked; period from ... to ... $

Deponent verily believes that this application should be allowed for the following reasons:

That the aforesaid tax of $15.65 was paid on the sale of one Indian Motocycle to the City of Westfield, a municipal corporation of the State of Massachusetts, as evidenced by copy of invoice attached;

That said Motorcycles was bought by the City of Westfield for use in the performance of police duties, and was so used;

That it is contended the regulations making taxable sales of motorcycles to municipalities for use in performing their governmental functions are invalid and in contravention of the Federal Constitution.

(Attach additional sheets if necessary.)

Sworn to and subscribed before me this 29th day of November, 1926

James E. Meskell
Notary Public.
My Commission expires Sept. 15, 1933.
(Title.)

INDIAN MOTOCYCLE COMPANY
Signature: By: Parnly Hanford
Treasurer.

(This affidavit may be sworn to before a Deputy Collector of Internal Revenue or Revenue Agent without charge.)

A true copy of said invoice is attached hereto and made a part hereof by reference, marked Exhibit "A." The invoice of the Indian Motocycle Company was paid by the City of Westfield out of public moneys by its check No. 22171, dated July 6, 1925, in the sum of $290.33, representing $276.50, the price of the motorcycle, and $13.83, the tax equivalent to 5 per centum of the price for which so sold.

(Here follows Exhibit "A" to Agreed Statement of Facts, marked side folio pages 3-a and 3-b)

3. The purchase of said motor-cycle was authorized by the City of Westfield for police purposes, and said motor-cycle was used at all times exclusively for police purposes.

4. Under the provisions of Subdivision (2) of Section 600 of the Revenue Act of 1924, the Commissioner of Internal Revenue assessed a tax equivalent to 5 per centum of the price for which said motor-cycle was sold, or $13.83, and the plaintiff paid the same to the United States on July 29, 1925.

5. On or about the 29th day of November, 1926, the plaintiff filed a claim for refund of the above tax in the sum of $13.83 with the Commissioner of Internal Revenue, a true copy of which is attached hereto and made a part hereof by reference, marked Exhibit "B," on the ground that "the regulations making taxable sales of motor-cycles to municipalities for use in performing their governmental functions are invalid and in contravention of the Federal Constitution," but the claim was wholly disallowed by letter of the Commissioner of Internal Revenue dated January 17, 1927, as follows:

"Reference is made to the claim filed by you for refund of $13.83, manufacturer's excise tax alleged to have been erroneously paid for the month of June, 1925.

"You state that the aforesaid tax of $13.83 was paid on the sale of one Indian Motocycle to the City of Westfield, a municipal corporation of the State of Massachusetts, which was bought by that city for use in the performance of police duties and was so used.

"You contend that the regulations making taxable sales of motorcycles to municipalities for use in performing their governmental functions are invalid and in contravention to the Federal Constitution.

[fol. 4] "You are advised that section 600, subdivision (2), of the Revenue Act of 1924, imposes a tax equivalent to 5 per cent of the price for which motorcycles (including tires, inner tubes, parts and accessories therefor, sold on or in connection therewith, or with the sale thereof) are sold or leased by the manufacturer, producer or importer.

"This office holds that the tax applies to the manufacturer's sale of articles enumerated in section 600, subdivision (2) of the Revenue Act of 1924, when sold to the United States Government or to a State or political subdivision thereof, even though they are to be paid for entirely out of public moneys and are to be used in the carrying on of governmental operations. This holding is in conformity with an opinion rendered by the Attorney General under date of July 7, 1919 (31 Ops. Att'y Gen. 521) relative to taxes imposed by the Revenue Act of 1918 corresponding to the tax imposed by section 600 (2), Revenue Act of 1924.

"Your claim is accordingly rejected."

6. The plaintiff has always borne true allegiance to the Government of the United States, and has not in any way aided, abetted or given encouragement to rebellion against said government. It has not made any transfer or assignment of said claim or any part thereof, and is the sole and absolute owner of the same.

The contention of the plaintiff is that the motorcycle was sold to a political subdivision of a State for use in carrying on its governmental operations and was not subject to tax under said Section 600, subdivision (2) of the Revenue Act of 1924.

The defendant contends that the tax herein was an excise tax imposed upon the sale of the motorcycle by the plaintiff company, which sale is strictly within the application of the taxing act, and that the fact that the motorcycle was purchased for use by a municipality does not relieve the article from the tax.

Under these circumstances this court being divided and being in doubt desires the instructions of the Supreme

Court upon the following question, a decision on which is [fol. 5] deemed indispensable to a proper disposition of this cause now before it and a proper discharge of the court's duties herein.

QUESTION CERTIFIED

Question. Where a motorcycle is sold by a private corporation to a municipal corporation of a State and the purchase of said motor-cycle was authorized by said municipal corporation for police purposes, for which said motorcycle was at all times exclusively used, is said transaction within the provisions of Section 600, Subdivision (2) of the Revenue Act of 1924 (43 Stat. 322) and the decision of the Supreme Court in the case of the Panhandle Oil Company v. the State of Mississippi, decided on May 14, 1928, 277 U. S. 218, and taxable thereunder?

It is respectfully requested that the Supreme Court of the United States give appropriate instructions on the above question, certify and transmit the same to the Court of Claims of the United States for its guidance in the further progress of the cause.

Fenton W. Booth, Chief Justice; McKenzie Moss, Judge; Wm. R. Green, Judge; N. J. Sinnott, Judge; the judges who sat on the hearing of the case.

---

[fol. 6] CLERK'S CERTIFICATE

I, J. Bradley Tanner, Chief Clerk of the Court of Claims of the United States, do hereby certify that the foregoing certificate in the case of Indian Motocycle Company, a corporation, v. the United States of America, No. H-49, was duly filed and entered of record in my office by order of said court, and as directed by said court, the said certificate is by me transmitted to the Supreme Court of the United States for its action thereon.

In testimony whereof I hereunto subscribe my name and affix the seal of the Court of Claims of the United States, at my office in Washington, D. C., this 1st day of December, 1928.

J. Bradley Tanner, Clerk Court of Claims of United States. (Seal Court of Claims.)

[fol. 7] EXHIBIT A

IN THE COURT OF CLAIMS OF THE UNITED STATES

No. H-49

INDIAN MOTOCYCLE COMPANY, a Corporation, Plaintiff,

*vs.*

THE UNITED STATES OF AMERICA, Defendant

PETITION—Filed February 9, 1927

To the Honorable the Court of Claims:

The plaintiff respectfully represents:

(1) The plaintiff is a corporation duly incorporated under the laws of the State of Massachusetts on or about October 4, 1913, with its principal offices and place of business in the City of Springfield, State of Massachusetts.

(2) During the time hereinafter mentioned, there were in effect certain provisions of Section 600 of the Revenue Act of 1924, which provisions were as follows:

* * * "there shall be levied, assessed, collected and paid upon the following articles sold or leased by the manufacturer, producer, or importer, a tax equivalent to the following percentage of the price for which so sold or leased—

[fol. 8] (1) Automobile truck chas-is and automobile wagon chassis sold or leased for an amount in excess of $1,000, and automobile truck bodies and automobile wagon bodies sold or leased for an amount in excess of $200 (including in both cases tires, inner tubes, parts, and accessories therefor sold on or in connection therewith or with the sale thereof), 3 per centum. A sale or lease of an automobile truck or of an automobile wagon shall, for the purpose of this subdivision, be considered to be a sale of the chassis and of the body;

(2) Other automobile chassis and bodies and motor cycles (including tires, inner tubes, parts, and accessories therefor sold on or in connection therewith or with the sale thereof), except tractors, 5 per centum. A sale or

lease of an automobile shall, for the purposes of this subdivision, be considered to be a sale of the chassis and of the body;

(3) Tires, inner tubes, parts, or accessories for any of the articles enumerated in subdivision (1) or (2), sold to any person other than a manufacturer or producer of any of the articles enumerated in subdivision (1) or (2), 2½ per centum. This subdivision shall not apply to chassis or bodies for automobile trucks, automobile wagons, or other automobiles."

(3) Pursuant to the provisions of said Act, the Commissioner of Internal Revenue with the approval of the Acting Secretary of the Treasury on August 29, 1924, promulgated Regulations 47 relating to the Excise Taxes on [fol. 9] Sales by the Manufacturer under Section 600 of the Revenue Act of 1924, which regulations provided in part as follows:

"Art. 10. Sales to the Government or a State.—The tax applies to articles enumerated in section 600, except those enumerated under subdivision 6 (see art. 19), when sold to the United States Government. The same is true of articles sold to a State or political subdivision thereof, even though they are to be paid for entirely out of public moneys and are to be used in the carrying on of governmental operation. When the Government supplies a manufacturer with all material and parts, except a small portion furnished by the manufacturer under a contract stipulating that the manufacturer shall be guaranteed a certain profit, no tax is payable. Articles manufactured for Government use in plants taken over and operated by the Government are not subject to tax. The rules applicable to the taxability of sale to the United States Government apply equally in the case of articles sold to foreign governments. (See also art. 19.)"

(4) On or about June 16, 1925, the plaintiff sold and delivered to the City of Westfield, a municipal corporation created by the sovereign State of Massachusetts, one Indian Motocycle, and the invoice covering the sale showed the following:

[fol. 10] 1 Indian Motorcycle, Model GE Motor No. 57 Y 304, Tires Baloon ..... 247.50
Max hand lum., dial speedometer, net ..... 16.00
Extra chief ammeter and switch and horn ..... 6.00
Net extra balloon tires, net extra ..... 2.00 / 5.00
Amount of tax ..... 13.83

$290.33

(5) The purchase of said motorcycle was authorized by the City of Westfield for police purposes, and said motorcycle was used at all times exclusively for police purposes, a governmental function. The invoice of the Indian Motorcycle Company was paid by the City of Westfield by its check No. 22171, dated July 6, 1925, in the sum of $290.33, representing $276.50, the price of the motorcycle, and $13.83, the tax equivalent to 5 per centum of the price for which so sold.

(6) On July 29, 1925, the plaintiff paid to the United States the sum of $13.83 as taxes levied, assessed, collected and paid under Section 600 (2) of the Revenue Act of 1924 on the sale of said motorcycle to the City of Westfield.

(7) The tax in the sum of $13.83 on said motorcycle was erroneously and illegally levied, assessed, collected and paid, for the reason that that part of Article 10 of Regulation 47 imposing said tax upon articles sold to a state or political subdivision thereof, even though they are paid for entirely out of public moneys and are used in the carrying on of governmental operation, is in contravention of the [fol. 11] constitution of the United States and is null, void and of no effect.

(8) On or about the 29th day of November, 1926, the plaintiff filed a claim for refund of the above tax in the sum of $13.83 with the Commissioner of Internal Revenue, and the claim was wholly disallowed by letter of the Commissioner dated January 17, 1927, as follows:

"Reference is made to the claim filed by you for refund of $13.83, manufacturer's excise tax alleged to have been erroneously paid for the month of June, 1925.

"You state that the aforesaid tax of $13.83 was paid on the sale of one Indian Motorcycle to the City of Westfield, a municipal corporation of the State of Massachusetts, which was bought by that city for use in the performance of police duties and was so used.

"You contend that the regulations making taxable sales of motorcycles to municipalities for use in performing their governmental functions are invalid and in contravention to the Federal constitution.

"You are advised that section 600, subdivision (2), of the Revenue Act of 1924, imposes a tax equivalent to 5 per cent of the price for which motorcycles (including tires, inner tubes, parts and accessories therefor, sold on or in connection therewith, or with the sale thereof) are sold or leased by the manufacturer, producer or importer.

[fol. 12] "This office holds that the tax applies to the manufacturer's sale of articles enumerated in section 600, subdivision (2) of the Revenue Act of 1924, when sold to the United States Government or to a State or political subdivision thereof, even though they are to be paid for entirely out of public moneys and are to be used in the carrying on of governmental operations. This holding is in conformity with an opinion rendered by the Attorney General under date of July 7, 1919 (31 Ops. Att'y Gen. 521), relative to taxes imposed by the Revenue Act of 1918 corresponding to the tax imposed by section 600 (2), Revenue Act of 1924.

"Your claim is accordingly rejected."

(9) No part of said sum of $13.83 erroneously collected by the United States has been repaid to the plaintiff. The plaintiff has at all times borne true allegiance to the Government of the United States and has not in any way aided, abetted or given encouragement to rebellion against said government. It is the sole and absolute owner of the claim herein presented. It has made no transfer or assignment of said claim or any part thereof, and is justly entitled to the amount claimed herein from the United States after allowing all just credits and set-offs.

(10) The plaintiff therefore prays judgment in the sum of $13.83 with interest thereon at 6 per cent per annum

[fol. 13] from July 29, 1925, the date of the payment of said tax.

Indian Motocycle Company, by Parmly Hanford, Treasurer. Monte Appel, Attorney for Plaintiff, Munsey Building, Washington, D. C. Frederick Schwertner, C. A. Heisterman, L. Harold Sothoron, of Counsel.

*Duly sworn to by Parmly Hanford. Jurat omitted in printing.*

[Endorsed:] Court of Claims. No. H-49. Indian Motocycle Company v. The United States. Filed Dec. 3, 1928, Court of Claims.

Endorsed on cover: File No. 33,885. Court of Claims. Term No. 576. Indian Motocycle Company, vs. The United States of America. (Certificate.) Filed Dec. 11th, 1928. File No. 33,885.

In the Court of Claims

INDIAN MOTOCYCLE COMPANY

v.

THE UNITED STATES

*Amended question of law*

Question of law certified by the Court of Claims to the Supreme Court of the United States, December 4, 1928

At the suggestion of counsel and in conformity with the procedure of the Supreme Court of the United States as set forth in Old Colony Trust Company et al. v. Commissioner, 279 U. S. 716, the question certified with respect to the Indian Motocycle Company v. United States, H–49, is amended to read as follows:

"Where a motor cycle is sold by the manufacturer thereof to a municipal corporation of a State, which has authorized its purchase solely for police purposes, and said motor cycle has at all times been exclusively used for such purposes, is the transaction within the provisions of sec. 600, subdivision (2) of the revenue act of 1924 (43 Stat. 322), and taxable thereunder, notwithstanding the decision of the Supreme Court in the case of Panhandle Oil Co. v. The State of Mississippi, decided May 7, 1928, 277 U. S. 218?"

BY THE COURT.
F. C. KLEINSCHMIDT,
*Assistant Clerk.*

I, F. C. Kleinschmidt, assistant clerk of the Court of Claims of the United States, do hereby certify that the foregoing amended certificate in the case of Indian Motocycle Company, a corporation, v. the United States of America, No. H–49, was duly filed and entered of record in my office by order of said court, September 16, 1930, and as directed by said court, the said amended certificate is by me transmitted to the Supreme Court of the United States for its action thereon.

In Testimony whereof, I hereunto subscribe my name and affix the seal of the Court of Claims of the United States, at my office in Washington, D. C., this 16th day of September, A. D., 1930.

[SEAL.] F. C. KLEINSCHMIDT,
*Assistant Clerk, Court of Claims of the United States.*

(Indorsed on back:) File No. 33885. Supreme Court U. S. October term, 1930. Term No. 5. Indian Motocycle Co. vs. The United States of America. Amendment to question certified. Filed September 17, 1930.

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No. 33,885

Office Supreme Court
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CHARLES ELMORE C

# SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1928

No. ~~456~~ 5

INDIAN MOTOCYCLE COMPANY

*vs.*

THE UNITED STATES OF AMERICA

ON CERTIFICATE FROM THE COURT OF CLAIMS

## *BRIEF FOR PLAINTIFF*

MONTE APPEL,
*Attorney for Plaintiff,*
Munsey Building,
Washington, D. C.

Of Counsel:
FREDERICK SCHWERTNER,
National Press Building,
Washington, D. C.

HAYWORTH PRINTING COMPANY, WASHINGTON, D. C.

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# SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1928

No. 576

INDIAN MOTOCYCLE COMPANY

*vs.*

THE UNITED STATES OF AMERICA

ON CERTIFICATE FROM THE COURT OF CLAIMS

## *BRIEF FOR PLAINTIFF*

The Court of Claims did not render any decision in this case, but certified the question of law involved for appropriate instructions.

### GROUNDS UPON WHICH THE JURISDICTION OF THIS COURT IS INVOKED

The jurisdiction of this Court is invoked by the certificate of the Court of Claims requesting instructions upon the question of law stated in its certificate. This procedure is authorized by Section 3 (a) of the Act of February 13, 1925 (43 Stat. 936).

### QUESTION CERTIFIED

The Court of Claims certified to this Court the following question:

"Where a motorcycle is sold by a private corporation

to a municipal corporation of a State and the purchase of said motorcycle was authorized by said municipal corporation for police purposes, for which said motorcycle was at all times exclusively used, is said transaction within the provisions of Section 600, Subdivision (2) of the Revenue Act of 1924 (43 Stat. 322) and the decision of the Supreme Court in the case of the *Panhandle Oil Company* v. *The State of Mississippi*, decided on May 14, 1928, 277 U. S. 218, and taxable thereunder?"

## Statute Involved

The statute here involved is Section 600, Subdivision (2) of the Revenue Act of 1924, the pertinent parts of which read as follows:

"Sec. 600. On and after the expiration of thirty days after the enactment of this Act there shall be levied, assessed, collected, and paid upon the following articles sold or leased by the manufacturer, producer or importer, a tax equivalent to the following percentage of the price for which so sold or leased—

"(2) Other automobile chassis and bodies and motorcycles (including tires, inner tubes, parts, and accessories therefor sold on or in connection therewith or with the sale thereof), except tractors, 5 per centum. A sale or lease of an automobile shall, for the purposes of this subdivision, be considered to be a sale of the chassis and the body."

## Statement of The Case

The pertinent facts of this case are as follows:

On June 16, 1925, Indian Motocycle Company, a Massachusetts corporation, with its office and plant at Springfield, Massachusetts, sold a motorcycle to the City of Westfield, a municipal corporation created by the Commonwealth of Massachusetts. (R. 2.)

The purchase of said motorcycle was authorized by the City of Westfield for police purposes, and the motorcycle was at all times used exclusively for such purposes. (R. 3.)

The price of the motorcycle with the accompanying accessories was $276.50. The tax at 5 per centum, as con-

templated by Section 600, Subdivision (2), of the Revenue Act of 1924 (43 Stat. 322) amounted to $13.83. (R. 2.)

The Motocycle Company submitted to the City of Westfield an invoice in the amount of $290.33, $276.50 representing the sales price of the motorcycle with accompanying accessories, and $13.83 the tax equivalent to 5 per centum of such sales price. (R. 2.)

The City of Westfield, out of its public monies, paid the Motocycle Company the amount of the invoice by delivering its check for $290.33, dated July 6, 1925. (R. 3.)

The Commissioner of Internal Revenue assessed and collected from the Motocycle Company a tax of $13.83 on account of the sale of the said motorcycle. The Motocycle Company filed a claim for refund of said tax which claim the Commissioner of Internal Revenue rejected. The Motocycle Company then instituted in the Court of Claims a suit for recovery of said tax, which suit resulted in the certification to this Court of the question here before it. (R. 3.)

## The Contention of Plaintiff

The claim here advanced by the plaintiff is that the Federal and state Governments are each sovereign in their respective spheres; that neither can by taxes lay a burden upon, or in any manner interfere with, the untrammeled exercise of the governmental functions entrusted under the Constitution to the other; that the police power within the corporate limits of the City of Westfield is a power entrusted under the Constitution to the City of Westfield and the Commonwealth of Massachusetts; that the imposition and collection by the Federal Government of the tax here involved burdens and interferes with the exercise by the City of Westfield of such police powers; that Section 600, Subdivision (2), of the Revenue Act of 1924 (43 Stat. 322), if construed to impose such tax in this case, is in contravention of the Constitution and void; that, in accord with the rule that a statute capable of two constructions, one of which leads to constitutionality and the other of which leads to unconstitutionality, is to be construed so as to sustain its validity, this Court should in this case construe the Revenue Act of 1924 so as to put the taxation of the sale here in question beyond its purview.

## The Precise Question Before This Court

The question upon which the Court of Claims has requested the instruction of this Court is:

Where a motorcycle is sold by a private corporation to a municipal corporation of a State and purchase of said motorcycle was authorized by said municipal corporation for police purposes, for which said motorcycle was at all times exclusively used, is said transaction within the provisions of Section 600, Subdivision (2) of the Revenue Act of 1924 (43 Stat. 322) and the decision of the Supreme Court in the case of the *Panhandle Oil Company* v. *The State of Mississippi*, decided on May 14, 1928, 277 U. S. 218, and taxable thereunder?

The answer to this question in turn depends upon the answer to be given to the question: Does the imposition and collection of this tax upon the sale of this motorcycle to the City of Westfield burden or interfere with the exercise by the City of Westfield of its police powers?

The answer to this question does not turn upon the amount or degree of such burden or interference. The test in this case is to be sharply distinguished from the test in cases where the claim is made that taxation by the states burdens or interferes with interstate commerce. The criterion of interference by the states with interstate commerce is one of degree and the inquiry in such cases is properly one as to the degree or amount of such interference. But in this case the degree or amount of interference with the exercise by the City of Westfield of its governmental functions is immaterial to the question of the validity of the tax here sought to be imposed. The constitutional prohibition against interference by the Federal Government or the states with the exercise of the governmental functions of the other is absolute. There is an entire absence of power on the part of either the United States or the states to interfere with the exercise of power entrusted under the Constitution to the other. The question in this case, therefore, is not, does the imposition of this tax interfere with the exercise by the City of Westfield of its police powers to such a degree as to destroy such powers? The question is not even, does this tax interfere in an unreason-

able degree with the exercise of such powers? Such inquiries would be pertinent if the claim advanced in this case were that the imposition of a state tax interfered with interstate commerce. But no such claim is here advanced. The claim here advanced is that the Federal Government has no power to burden or interfere with the exercise of the governmental powers entrusted under the Constitution to the City of Westfield, and the sole question here presented is, does the imposition and collection of this tax burden or interfere with the exercise of such powers?

Since *McCulloch* v. *Maryland*, 4 Wheat. 316, such has been the rule of this Court, repeatedly affirmed in subsequent decisions.

In *Johnson* v. *Maryland*, 254 U. S. 51, wherein it was held that a state may not require a post office employe to cease driving a Government motor truck in the transportation of mail over a post road until he shall obtain a license by submitting to examination before a state official and paying a fee, Mr. Justice Holmes said (at pp. 55-56):

> "The cases upon the regulation of interstate commerce cannot be relied upon as furnishing an answer. They deal with the conduct of private persons in matters in which the states as well as the general government have an interest and which would be wholly under the control of the states but for the supervening destination and the ultimate purpose of the Acts. Here the question is whether the states can interrupt the acts of the general government itself. With regard to taxation, no matter how reasonable, or how universal and undiscriminating, the state's inability to interfere has been regarded as established since *McCulloch* v. *Maryland*, 4 Wheat. 316, 4 L. ed. 579. The decision in that case was not put upon any consideration of degree, but upon the entire absence of power on the part of the states to touch, in that way, at least, the instrumentalities of the United States (4 Wheat. 429, 430), and that is the law today. * * *"

The same rule was again enunciated by Mr. Justice Holmes in *Gillespie* v. *Oklahoma*, 257 U. S. 501, in which

it was held that a state may not impose a tax upon the net income derived by a lessee of restricted Creek and Osage Indian Lands from sales of his share of oil and gas received under his leases, as follows (at pp. 504-5):

> "The argument for the state is based primarily upon the cases sustaining taxes upon net income that include gains from interstate commerce (*Shaffer* v. *Carter*, 252 U. S. 37, 57, 64 L. ed. 445, 458, 40 Sup. Ct. Rep. 221; *United States Glue Co.* v. *Oak Creek*, 247 U. S. 321, 62 L. ed. 1135, 38 Sup. Ct. Rep. 449, Ann. Cas. 1918 E. 748) when 'all expenses are paid and losses adjusted, and after the recipient of the income is free to use it as he chooses' (*William E. Peck & Co.* v. *Lowe*, 247 U. S. 165, 175, 62 L. ed. 1049, 1052, 38 Sup. Ct. Rep. 432).
>
> "* * * The criterion of interference by the states with interstate commerce is one of degree. It is well understood that a certain amount of reaction upon and interference with such commerce cannot be avoided if the states are to exist and make laws. *New York, N. H. & H. R. Co.* v. *New York*, 165 U. S. 628, 41 L. ed. 853, 17 Sup. Ct. Rep. 418; *Diamond Glue Co.* v. *United States*, 187 U. S. 611, 616, 47 L. ed. 328, 332, 23 Sup. Ct. Rep. 206. The rule as to instrumentalities of the United States, on the other hand, is absolute in form and at least stricter in substance. *Williams* v. *Talladego*, 226 U. S. 404, 416, 417, 419, 57 L. ed. 275, 280, 281, 33 Sup. Ct. Rep. 116; *Johnson* v. *Maryland*, 254 U. S. 51, 55, 65, L. ed. 126, 128, 41 Sup. Ct. Rep. 16."

In holding the tax valid, Mr. Justice Holmes said at p. 506:

> "* * * The same considerations that invalidate a tax upon the leases invalidates a tax upon the profits of the leases; and, stopping short of theoretical possibilities, a tax upon such profits is a direct hamper upon the effort of the United States to make the best

terms that it can for its wards. *Weston* v. *Charleston*, 2 Pet. 449, 468, 7 L. ed. 481, 488. * * * "

In *Panhandle Oil Co.* v. *Mississippi*, 277 U. S. 218, decided May 14, 1928, this Court again affirmed the long established rule.

The question in this case, therefore, ultimately resolves itself into the question as to whether the imposition and collection of the tax here involved does in fact burden or interfere with the exercise by the City of Westfield of its police powers.

## Argument

That the collection of the tax of $13.83 upon the purchase of the motorcycle did in fact increase the cost of the motorcycle to the City of Westfield is inescapable.

That a tax of this nature would be shifted to and become a burden upon the purchaser was clearly within the contemplation of Congress is disclosed by the Report of the Ways and Means Committee (Report No. 1, 69th Congress, 1st Session) accompanying the Revenue Act of 1926, wherein it is stated (at p. 16):

> "There are two other taxes which, while productive and easy to collect, constitute a burden upon the consumer, to whom they are in most cases shifted by the manufacturer. One of these is the tax on alcohol; the other upon automobile trucks, passenger automobiles, and parts and accessories for the same."

The Committee, of course, intended to include the term, "motorcycles."

The tax on the sale of the motorcycle in this case was in fact shifted to and in fact paid by the City of Westfield, just as in the Panhandle Oil Company case, supra, the tax on the sale of gasoline was shifted to and paid by the United States. The ultimate payment of this tax by the City of Westfield increased the cost of the motorcycle to the City by $13.83. It was clearly a burden upon the city and constituted a direct interference with its exercise of its governmental functions.

The imposition of such a burden upon the city is prohibited by Constitution. The Federal Government lacks the power to impose and collect this tax in this case. The reasonableness or unreasonableness of the amount of the tax is not a factor. Assuming the tax, viewed abstractly, to be reasonable in amount, the United States has no power to collect it upon this transaction.

Unless this Court is willing to remodel our Federal system and to enmesh the gears of the machineries of our Federal and state Governments in a way unknown since the foundation of the Republic, it would seem that the taxation of the transaction here under review should be held to be beyond the purview of the Revenue Act of 1924.

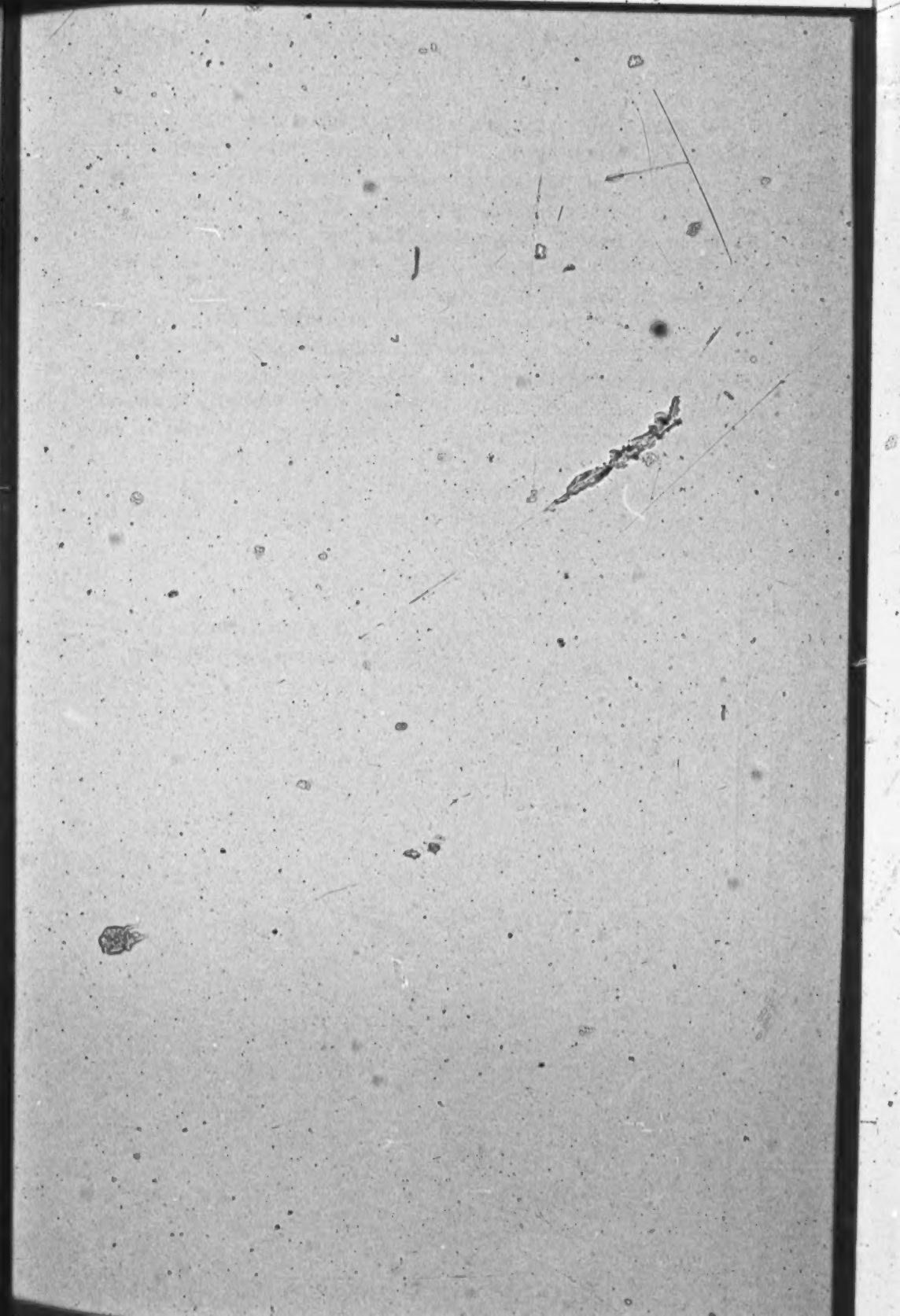
It is respectfully submitted that the question certified by the Court of Claims to this Court should be answered in the negative.

Respectfully submitted,

MONTE APPEL,
*Attorney for Plaintiff.*

Of Counsel:

FREDERICK SCHWERTNER.



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No. 5

IN THE

# Supreme Court of The United States

OCTOBER TERM, 1930

INDIAN MOTOCYCLE COMPANY

*v.*

THE UNITED STATES OF AMERICA

*ON CERTIFICATE FROM THE COURT OF CLAIMS*

## BRIEF FOR PLAINTIFF ON REARGUMENT

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## BRIEF FOR PLAINTIFF ON REARGUMENT

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### OPINION BELOW

The Court of Claims did not render any decision in this case, but certified the question of law involved for appropriate instructions.

### GROUNDS UPON WHICH THE JURISDICTION OF THIS COURT IS INVOKED

The jurisdiction of this Court is invoked by the certificate of the Court of Claims requesting instructions upon the question of law stated in its certificate. This procedure is authorized by Section 3 (a) of the Act of February 13, 1925 (43 Stat. 936).

## QUESTION CERTIFIED

The question certified to this Court as amended reads as follows:

Where a motor cycle is sold by the manufacturer thereof to a municipal corporation of a State, which has authorized its purchase solely for police purposes, and said motor cycle has at all times been exclusively used for such purposes, is the transaction within the provisions of sec. 600, subdivision (2) of the revenue act of 1924 (43 Stat. 322), and taxable thereunder, notwithstanding the decision of the Supreme Court in the case of *Panhandle Oil Co.* v. *The State of Mississippi,* decided May 4, 1928, 277 U. S. 218?

## STATUTE INVOLVED

The statute here involved is Section 600, Subdivision (2) of the Revenue Act of 1924, the pertinent parts of which read as follows:

"Sec. 600. On and after the expiration of thirty days after the enactment of this Act there shall be levied, assessed, collected, and paid upon the following articles sold or leased by the manufacturer, producer or importer, a tax equivalent to the following percentage of the price for which so sold or leased—

"(2) Other automobile chassis and bodies and motorcycles (including tires, inner tubes, parts, and accessories therefor, sold on or in connection therewith or with the sale thereof), except tractors, 5 per centum. A sale or lease of an automobile shall, for the purposes of this subdivision, be considered to be a sale of the chassis and the body."

## STATEMENT OF THE CASE

The pertinent facts of this case are as follows:

On June 16, 1925, Indian Motocycle Company, a Massachusetts corporation, with its office and plant at Springfield, Massachusetts, sold a motorcycle to the City of Westfield, a municipal corporation created by the Commonwealth of Massachusetts. (R. 2.)

The purchase of said motorcycle was authorized by the City of Westfield for police purposes, and the motorcycle was at all times used exclusively for such purposes. (R. 3.)

The price of the motorcycle with the accompanying accessories was $276.50. The tax at 5 per centum, as contemplated by Section 600, Subdivision (2), of the Revenue Act of 1924 (43 Stat. 322) amounted to $13.83. (R. 2.)

The Motocyle Company submitted to the City of Westfield an invoice in the amount of $290.33, $276.50 representing the sales price of the motorcycle with accompanying accessories, and $13.83 the tax equivalent to 5 per centum of such sales price. (R. 2.)

The City of Westfield, out of its public monies, paid the Motocycle Company the amount of the invoice by delivering its check for $290.33, dated July 6, 1925. (R. 3.)

The Commissioner of Internal Revenue assessed and collected from the Motocycle Company a tax of $13.83 on account of the sale of the said motorcycle. The Motocycle Company filed a claim for refund of said tax which claim the Commissioner of Internal Revenue rejected. The Motocycle Company then instituted in the Court of Claims

a suit for recovery of said tax, which suit resulted in the certification to this Court of the question here before it. (R. 3.)

### THE CONTENTION OF PLAINTIFF

The claim here advanced by the plaintiff is that the Federal and state Governments are each sovereign in their respective spheres; that neither can by taxes lay a burden upon, or in any manner interfere with, the untrammeled exercise of the governmental functions entrusted under the Constitution to the other; that the police power within the corporate limits of the City of Westfield is a power entrusted under the Constitution to the City of Westfield and the Commonwealth of Massachusetts; that the imposition and collection by the Federal Government of the tax here involved burdens and interferes with the exercise by the City of Westfield of such police powers; that Section 600, Subdivision (2), of the Revenue Act of 1924 (43 Stat. 322), if construed to impose such tax in this case, is in contravention of the Constitution and void; that, in accord with the rule that a statute capable of two constructions, one of which leads to constitutionality and the other of which leads to unconstitutionality, is to be construed so as to sustain its validity, this Court should in this case construe the Revenue Act of 1924 so as to put the taxation of the sale here in question beyond its purview.

## ARGUMENT

### I

### NEITHER THE UNITED STATES NOR ANY STATE HAS POWER UNDER THE CONSTITUTION TO IMPOSE A TAX WHICH BURDENS OR INTERFERES WITH THE EXERCISE BY THE OTHER OF ITS GOVERNMENTAL FUNCTIONS

It is well established by the decisions of this Court that neither the United States nor any State has power under the Constitution to impose a tax which burdens or interferes with the exercise by the other of its governmental functions. *McCulloch* v. *Maryland,* 4 Wheat. 316. *Weston* v. *City of Charleston,* 2 Pet. 449. *Dobbins* v. *The Commissioners of Erie County,* 16 Pet. 435. *Collector* v. *Day,* 11 Wall. 113. *Western Union Telegraph Company* v. *Texas,* 105 U. S. 460. *Choctaw & Gulf R. R. Co.* v. *Harrison,* 235 U. S. 292. *Indian Oil Co.* v. *Oklahoma,* 240 U. S. 522. *Johnson* v. *Maryland,* 254 U. S. 51. *Panhandle Oil Co.* v. *Knox,* 277 U. S. 218.

### II

### THE QUESTION AS TO WHETHER THE IMPOSITION AND COLLECTION OF THE TAX HERE INVOLVED BURDENS OR INTERFERES WITH THE EXERCISE BY THE CITY OF WESTFIELD OF ITS POLICE POWERS IS A QUESTION OF FACT AND NOT OF LAW

The inquiry as to whether a particular tax burdens a specific governmental operation calls for the determination of a fact. The ultimate fact of burden or non-burden must be determined in each case in the light of the precise facts presented to the Court by that particular case.

The inquiry as to the ultimate fact of burden or non-burden is primarily an inquiry into the existence or non-existence of a proximate causal re-

lationship between the tax, which is known, and the burden, which is to be determined. This question is also a question of fact.

The proximateness of the causal relationship between tax and burden in any particular case may be shadowy and vague or it may be clear and definite, depending entirely upon the precise facts which give rise to that particular case. There is no mathematically accurate measuring stick which can be applied in any given case for the determination of the proximateness or non-proximateness of the causal relationship between tax and burden. It is as to each case a matter of judgment.

The difference between a causal relationship which is vague and indistinct and one which is clear and definite is in one sense a matter of degree. If we find that a causal connection is vague and indistinct we say it is too remote and indirect to be proximate, and hold that the tax does not result in burden. If we find the causal connection to be clear and direct, we say it is proximate, and hold that the tax does result in burden. In the sense that the determination of the *fact* as to whether the tax is the proximate cause of a burden upon a governmental operation is a matter of judgment, is a matter of the relative definiteness or indefiniteness with which the causal relationship can be perceived, it is a matter of degree.

But once the causal relationship between tax and burden is factually determined, once the *fact* of burden is established, there is no further question of the degree or amount of that burden.

The law as uniformly established by the decis-

ions of this Court is not that the Federal Government and the States may each burden the exercise by the other of its governmental functions, but must not burden them too much in amount or too greatly in degree. The law is not that each may burden the governmental operations of the other by a small tax but not by a large one, or in a reasonable but not in an unreasonable degree. The law is not that each may by tax burden but must not destroy the exercise of the governmental functions of the other, with this Court sitting in each case as the arbiter of the reasonableness of the degree of interference and as the guardian against that degree of interference which would result in destruction.

The law as enunciated in the decisions of this Court since the foundation of the Republic is that the powers not delegated by the States to the Federal Government were reserved to the states; that the Federal Government in its sphere and the states in their sphere are each supreme and sovereign; that there is under the Constitution an entire want and absence of power on the part of each to burden or interfere with the exercise by the other of its sovereign governmental functions.

It is this reciprocal want of power on the part of both the United States and the states which creates and preserves the separate sovereignties of the United States and the states, and gives to the Republic a federalized form of government. The Constitutional prohibition is one of want of power to burden in any degree and this want of power, once the *fact* of burden is established, invalidates the tax which is the proximate cause of the burden.

## III

### THE IMPOSITION OF THE TAX HERE INVOLVED IN FACT BURDENED THE EXERCISE BY THE CITY OF WESTFIELD OF ITS POLICE POWERS

The tax in this case is a tax upon the sale of a motorcycle to the City of Westfield, measured entirely by the *gross sales price*.

The invoice rendered by the seller to the City of Westfield set out the price of the motor cycle and certain accessories aggregating $276.50 and included as a separate and distinct item "Amount of tax ..... $13.83," such $13.83 being exactly 5% of the purchase price and the exact amount of the tax imposed upon the sale by Section 600 (2) of the Revenue Act of 1924.

The City of Westfield paid the invoice by its check on its public monies for $290.33, representing $276.50, the price of the motor cycle and accessories, and $13.83, the amount of the tax.

The imposition and collection by the United States of this tax on this sale increased the cost of the motor cycle and accessories to the City of Westfield by exactly $13.83. The amount of the tax in its entirety was passed on to and collected from the City of Westfield.

The fact that these excise taxes on sales could be and would be passed on to and collected from the consumers was well known to the Congress. The frank recognition of this fact by Congress is disclosed by the report of the Ways and Means Committee (Report No. 1, 69th Congress, 1st Session) accompanying the Revenue Act of 1926, wherein it is stated (at p. 16):

> "There are two other taxes which, while productive and easy to collect, constitute a burden upon the consumer, to whom they are in most cases shifted by the manufacturer. One of these is the tax on alcohol; the other upon automobile trucks, passenger automobiles, and parts and accessories for the same."

The Committee, of course, intended no distinction as between automobiles and motor cycles.

In fact, the underlying theory of these excise taxes on sales which had their origin as war taxes was that they would be passed on to and collected from the consumer. They were generally designated as luxury taxes and the fact that the imposition of the tax increased the price to the consumer was justified by the answer that a consumer of luxuries in war time could afford to pay and in fairness should pay an increased price for such luxuries. It is a commonly known and generally accepted economic fact of which this Court should take judicial notice that the incidence of excise taxes on sales falls on the purchasers and consumers of the articles sold.

The imposition and collection by the United States of the tax in the amount of of $13.83 was the proximate cause of the increase of $13.83 in the price paid by the City of Westfield for the motor cycle.

There is here no difficulty in tracing the causal connection between tax and burden. The tax is measured by gross sales price, that is, by the gross income received by the seller and the gross outgo of the buyer. The causal connection need not be

traced through to net income. The causal connection between tax and burden is proximate, clear and definite. The imposition of the tax in fact burdened the exercise by the City of Westfield of its police powers.

## IV

### THE CONSTITUTIONAL PROHIBITION AGAINST INTERFERENCE BY THE FEDERAL GOVERNMENT OR THE STATES WITH THE EXERCISE OF THE GOVERNMENTAL FUNCTIONS OF THE OTHER IS ABSOLUTE, AND IS NOT DEPENDENT UPON THE DEGREE OF SUCH INTERFERENCE

The answer to the question certified by the lower court depends upon the answer to be given to the question: Does the imposition and collection of this tax upon the sale of this motorcycle to the City of Westfield in fact burden or interfere with the exercise by the City of Westfield of its police powers?

The answer to this question does not turn upon the amount or degree of such burden or interference. The test in this case is to be sharply distinguished from the test in cases where the claim is made that taxation by the states burdens or interferes with interstate commerce. The criterion of interference by the states with interstate commerce is one of degree and the inquiry in such cases is properly one as to the degree or amount of such interference. But in this case the degree or amount of interference with the exercise by the City of Westfield of its governmental functions is immaterial to the question of the validity of the tax here sought to be imposed. The constitutional prohibition against interference by the Federal Government or the states with the exercise of the governmental functions of the other is absolute. There

is an entire absence of power on the part of either the United States or the states to interfere with the exercise of power entrusted under the Constitution to the other. The question in this case, therefore, is not, does the imposition of this tax interfere with the exercise by the City of Westfield of its police powers to such a degree as to destroy such powers? The question is not even, does this tax interfere in an unreasonable degree with the exercise of such powers? Such inquiries would be pertinent if the claim advanced in this case were that the imposition of a state tax interfered with interstate commerce. But no such claim is here advanced. The claim here advanced is that the Federal Government has no power to burden or interfere with the exercise of the governmental powers entrusted under the Constitution to the City of Westfield, and the sole question here presented is, does the imposition and collection of this tax burden or infere with the exercise of such powers?

Since *McCulloch* v. *Maryland,* 4 Wheat. 316, such has been the rule of this Court, repeatedly affirmed in subsequent decisions.

In *Johnson* v. *Maryland,* 254 U. S. 51, wherein it was held that a state may not require a post office employe to cease driving a Government motor truck in the transportation of mail over a post road until he shall obtain a license by submitting to examination before a state official and paying a fee, Mr. Justice Holmes said (at pp. 55-56):

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> the states as well as the general government have an interest and which would be wholly under the control of the states but for the supervening destination and the ultimate purpose of the Acts. Here the question is whether the states can interrupt the acts of the general government itself. With regard to taxation, no matter how reasonable, or how universal and undiscriminating, the state's inability to interfere has been regarded as established since *McCulloch* v. *Maryland*, 4 Wheat. 316, 4 L. ed. 579. The decision in that case was not put upon any consideration of degree, but upon the entire absence of power on the part of the states to touch, in that way, at least, the instrumentalities of the United States (4 Wheat. 429, 430), and that is the law today. * * *"

The same rule was again enunciated by Mr. Justice Holmes in *Gillespie* v. *Oklahoma*, 257 U. S. 501, in which it was held that a state may not impose a tax upon the net income derived by a lessee of restricted Creek and Osage Indian Lands from sales of his share of oil and gas received under his leases, as follows (at pp. 504-5):

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are paid and losses adjusted, and after the recipient of the income is free to use it as he chooses' (*William E. Peck & Co.* v. *Lowe*, 247 U. S. 165, 175, 62 L. ed. 1049, 1052, 38 Sup. Ct. Rep. 432).

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In *Panhandle Oil Co.* v. *Mississippi*, 277 U. S. 218, decided May 14, 1928, this Court again affirmed the long established rule.

The question in this case, therefore, ultimately resolves itself into the question as to whether the imposition and collection of the tax here involved does in fact burden or interfere with the exercise by the City of Westfield of its police powers.

## V

### IF THE COLLECTION OF THE TAX IMPOSED BY THE UNITED STATES IN FACT BURDENED THE EXERCISE BY THE CITY OF WESTFIELD OF ITS GOVERNMENTAL OPERATIONS, IT IS OF NO CONSEQUENCE THAT THE TAX WAS NOT COLLECTED DIRECTLY FROM THE CITY OF WESTFIELD OR FROM ONE OF ITS INSTRUMENTALITIES OR AGENTS

The tax here involved was an excise tax upon the sale of a motor cycle. The Indian Motocycle Company, the plaintiff, was the seller and the City of Westfield was the buyer.

The tax was imposed upon the sale. The duty of reporting the sale and paying the tax was laid upon the seller. The selection of the seller instead of the buyer as the one to be charged with the legal duty of reporting and paying was prompted solely by considerations of administrative efficiency, as will be shown in a subsequent part of this brief. It was entirely a question of the selection of a machinery for the administration and collection of the tax.

Once the *fact* of burden is established, it is immaterial what kind of machinery or collection device was used to impose the burden. This may be most concretely demonstrated by a discussion of two cases heretofore cited.

In *Western Union Telegraph Company* v. *State of Texas,* 105, U. S. 460, this Court held invalid an excise tax of one cent imposed by the State of Texas upon each message transferred by the Telegraph Company when the United States was the sender. The duty of reporting the transaction and paying the tax was upon the Telegraph Company.

In *Weston* v. *City of Charleston,* 2 Pet. 449, this Court held invalid a tax upon stock imposed by the

City of Charleston upon stock of the United States. The tax was payable by the owners of the stock.

Obviously, neither the telegraph company in the Western Union case, nor the individual owner of the stock of the United States in the Weston case was the instrumentality of the United States. Nor was either an agent of the United States. The respective taxes before the Court in these two cases were held invalid, not because the persons from whom such taxes were collectible were instrumentalities or agents of the United States, but because the imposition and collection of these taxes from these persons created a burden in fact upon essential governmental operations of the United States. The fact of burden being once established, it was no answer to the charge of invalidity that the taxes were not collectible from the United States. The particular administrative machinery set up for the levy, assessment and collection of these taxes was of no consequence. Having found as a fact that the taxes burdened the governmental operations of the United States, this Court held such taxes invalid, without reference to the person from whom such taxes were collected.

## VI

### THE DECISION OF THIS COURT IN THE PANHANDLE OIL COMPANY CASE CONTROLS THIS CASE

The Panhandle Oil Company case and this case are identical on their facts. In both cases the tax imposed was an excise tax. In both cases the act taxed was sale. In both cases the tax was measured by the gross sales price. In both cases the legal duty of reporting the transaction and paying the

tax was upon the seller. In both cases the seller was a private corporation.

No distinction is drawn in the cases and none is suggested by the Solicitor General as between the power of a State to tax the governmental operations of the United States and the power of the United States to tax the governmental operations of a State. The want of power is mutual and identical. If it be sound, as was held by this Court in the Panhandle case, that a tax measured by gross sales price upon a sale to the United States is invalid, it follows that a tax measured by gross sales price upon a sale to a state is invalid.

## VII

### THE PANHANDLE OIL COMPANY CASE AND THIS CASE CANNOT BE DISTINGUISHED ON THE GROUND OF A DIFFERENCE BETWEEN THE THINGS TAXED

The plaintiff in its brief filed upon the original submission of this case, contended that this case was controlled by the decision of this Court in the case of *Panhandle Oil Co.* v. *Knox,* 277 U. S. 218.

The Government in its brief, filed upon the original submission of this case, admitted the correctness of plaintiff's contention and stated, "* * * we believe that the present case is not distinguishable from the Panhandle Oil Co. case and that the plaintiff in the present case is therefore entitled to recovery."

Since this Court set this case down for reargument, the Government has filed a second brief, and in this second brief, has completely reversed its position as stated in its original brief.

In its second brief, the Government refrains from attacking the correctness of the decision of

this Court in the Panhandle case. On the contrary, the Government in its second brief, impliedly admits the correctness of this Court's decision in the Panhandle case, but undertakes to distinguish the Panhandle case from this case.

The Government does not contend that the two cases are distinguishable on their facts. On the contrary, the Government, by implication at least, admits that the facts in the two cases are substantially identical. The Government does not undertake to make any distinction between the two cases on the ground that there is a difference in the nature of the tax sought to be imposed. On the contrary, the Government, by implication at least, admits that the taxes sought to be imposed in both cases are excise taxes. The sole distinction sought to be made by the Government is that there is a difference in the thing taxed. In the Panhandle case the thing taxed was the sale. In this case the thing taxed, so the Government contends, is the manufacture, production or importation *and* sale.

The answer of the plaintiff to the Government's contention that the Panhandle case and this case are distinguishable on the ground that there is a difference in the thing taxed is, first, that no such difference in fact exists and, second, that such difference, if it did exist, would lead to no difference in legal result.

If there is a difference between the things taxed under the two statutes, such difference can be found only in the statutes themselves. That no such difference in fact exists is made clear by a comparison of the words of such statutes.

In the Panhandle case, the statute involved was

Chapter 116 of the Laws of Mississippi of 1922, which provided that "* * * any person engaged in the business of distributing gasoline, or retail dealer in gasoline, shall pay for the privilege of engaging in such business an excise tax of 1c (one cent) per gallon upon the sale of gasoline * * *."

In this case, the statute involved is Section 600 (2) of the Revenue Act of 1924, which provided that "* * * there shall be levied, assessed, collected, and paid upon the following articles sold or leased by the manufacturer, producer, or importer, a tax equivalent to the following percentage of the price for which so sold or leased ————."

Under both statutes the thing taxed was the sale, that is, the transfer of title from vendor to vendee. The only difference in the statutes is in the machinery for assessment and collection of the tax and this difference is wholly one of administration.

A motor cycle to come into being and be within the confines of the United States and so subject to tax by the United States must of necessity be either manufactured or produced in the United States or imported into the United States. Hence by providing that the tax should be collectible from either the manufacturer, producer or importer, as the case might be, the Federal statute was made administratively effective. The tax was upon the sale. But the sale as an abstract thing could not be charged with the legal duty of reporting the transaction and paying the tax. This duty of necessity had to be laid upon some person.

Since the tax was upon the sale, the legal duty of reporting the transaction, as a matter of practical

necessity, had to be imposed upon either the seller or the buyer.

To impose this duty on the buyer was not practical or advisable from an administrative viewpoint. The Government would be dealing with too many people, many of them with no fixed place of business, many of them financially irresponsible. Too many buyers would fail to make the reports and pay the tax. The cost to the Government of handling the millions of reports, literally millions, which would be made each month by the purchasers of the automobiles, the kodaks, the motor cycles and the other things subjected to sales tax, would be too great. It was not administratively feasible to impose upon the buyers the duty of reporting the transaction and paying the tax.

With the sellers the situation was quite different. Relatively few in number, having fixed places of business, generally financially responsible, the Government could impose on them the duty of reporting the transaction and paying the tax with the realization that there would be little or no tax evasion and that the expense of administering this tax would be reduced to a minimum. Administratively viewed, the imposition on the sellers of the legal duty of reporting and paying was feasible, effective and cheap.

It was these considerations of administrative policy which prompted the Government to impose the legal duty of reporting the transaction and paying the tax upon the sellers, rather than upon the buyers. Since manufacturers, producers and importers of motor cycles manufacture, produce or import, as the case may be, for sale and not for use,

and since every motor cycle, to come into being and be within the United States so as to be subject to tax, must be either manufactured or produced or imported, the enumeration in the Revenue Act of "manufacturer, producer and importer" included every possible initial seller and made definite and certain the particular seller who was under the legal duty of reporting and paying the tax.

This particularity was essential to clarity in the statute. The tax was upon the sale. The intent was to collect one tax upon one sale. A motor cycle may be sold a number of times. Only one sale is to be taxed. To which sale is the tax to attach? Which one of several possible sellers of the same motor cycle shall be charged with the duty of reporting the transaction and paying the tax? Administratively viewed, the easiest seller to deal with is the first seller. The first sale is the easiest sale to locate and tax. And it was against the first sale that this tax was directed. But how can the first sale be most accurately defined in the statute? Shall the statute say "the first sale" and permit each seller to determine for himself whether he is the first seller of a particular motor cycle or shall the statute set out an enumeration of classes of persons, into one of which classes each initial seller must of necessity fall? The statute wisely adopted the latter alternative. By enumerating "manufacturer, producer, or importer," it fixed the first seller with definiteness and made sure that the first sale and no subsequent sale would be taxed.

But the enumeration of "manufacturer, producer or importer" as the three classes into one of which a first seller of a motor cycle must of necessity fall, did not impose on the manufacturer, pro-

ducer or importer a tax as such. No tax was imposed on him because he was a manufacturer, producer or importer, or because he manufactured, produced or imported motor cycles. He could manufacture, produce or import motor cycles by the thousand without one penny of tax attaching. If it happened that, after manufacture, production or importation, the motor cycles were burned up, no tax would ever attach. It was solely the fact of sale which caused the tax to attach and it was solely the fact that the manufacturer, producer or importer was the seller which caused him to be under the legal duty of reporting the transaction and paying the tax. It was solely as the seller that he came into the tax picture and the fact of his description in the tax statute as manufacturer, producer or importer was prompted solely by consideration of administrative policy and not by any intent to tax him or his act of manufacturing, producing or importing.

The same considerations of administrative policy prompted the State of Mississippi in the statute involved in the Panhandle case to impose upon the distributor or dealer the duty of reporting and paying the tax upon sales of gasoline.

Most, if not practically all, of the gasoline consumed in the State of Mississippi was manufactured or produced outside the State. An attempt to charge the manufacturer or producer with the duty of reporting the transaction and paying the tax would have been in most instances a nullity, both jurisdictionally and administratively. Some person, other than the manufacturer or producer, upon whom this duty could be imposed, had to be

found. As a matter of practical necessity, it had to be either the seller or the buyer. The practical considerations which prompted the Federal Government not to try to deal with the buyers operated with equal force upon the State of Mississippi. The same practical considerations prompted both governments to impose upon the seller the duty of reporting and paying. In both cases one tax upon one sale was to be imposed. Upon sales of gasoline within a State, the particular seller upon whom the duty could be most effectively imposed was the first seller. As a practical proposition the first seller was either the distributor who was the wholesaler or the dealer who was the retailer. If the first sale of the gasoline made within the State was made by a wholesaler, then the tax attached to this sale and the wholesaler had to report and pay the tax. If a retailer bought his gasoline directly from a manufacturer outside the State and thus eliminated the wholesaler, then the first sale of this gasoline within the State would be made by the retailer, and the tax attached to this sale, and the dealer had to report and pay the tax. In both cases, whether the gasoline was purchased by the wholesaler and sold to the retailer, or purchased directly by the retail dealer from the manufacturer, the first sale within the State was the sale taxed and the only sale taxed. In both cases, the first seller was the one who was charged with the duty of reporting and paying. It was the fact that the distributor or retailer, as the case might be, was the first seller, and not the fact that he was a distributor or retailer or that he distributed or retailed, which caused the tax to attach.

Under both the Mississippi statute and the Fed-

eral statute the sale was the thing taxed. Under both statutes the fact of sale alone caused the tax to attach and under neither statute was any other or further act essential to the attachment of the tax. The only difference between the statutes is in the administrative machinery adopted for the assessment and collection of the taxes imposed.

It is submitted, therefore, that the distinction which the Government has attempted to draw between this case and the Panhandle case has no basis in fact and that on the basis of both the intent of the two statutes and their actual operation, the two cases are identical.

## VIII

### ASSUMING THAT THE DIFFERENCE BETWEEN THE PANHANDLE CASE AND THIS CASE FOR WHICH THE GOVERNMENT CONTENDS, IN FACT EXISTS, SUCH DIFFERENCE WOULD LEAD TO NO DIFFERENCE IN LEGAL RESULT BETWEEN THE CASES

This Court, in *Cornell* v. *Coyne,* 192 U. S. 417, held valid a tax imposed by the United States upon the manufacture of filled cheese and in *Wheeler Lumber Company* v. *United States,* 281 U. S. 572, a tax imposed by the United States upon transportation. In an effort, apparently, to escape control of the Panhandle case and at the same time to bring this case within the control of the filled cheese and Wheeler Lumber Company cases, the Government advances its argument that the thing taxed in the Panhandle case was the sale, whereas the thing taxed in this case was the manufacture, production, or importation *and* sale. Assuming the existence of this difference for which the Government contends, it would lead to no difference in legal result between the Panhandle case and this case.

The filled cheese case held valid a tax upon manufacture. The Panhandle case held invalid a tax upon sale. In this case, says the Government, we have a tax upon manufacture *and* sale, that is, a combination of the tax which was held valid and the tax which was held invalid. A valid tax added to an invalid tax, argues the Government, makes the invalid tax valid.

The argument is patently fallacious. If the Federal Government is without power under the Constitution to retard, impede or burden by tax the exercise by the state of its governmental functions, then, obviously, the Federal Government cannot create that power by purporting to exercise it in conjunction with another power which it admittedly has. If the Federal Government is without power under the Constitution to interfere with the exercise by the states of their governmental functions, then there is obviously nothing which the legislative or executive branches of the Federal Government can do to amend in effect the prohibition of the Constitution and create for themselves a power which is denied to them by the Constitution. If the Federal Government is without power under the Constitution to levy and collect a tax upon a sale to a state, under the facts of this case, then that want of power is not supplied and inherently cannot be supplied by a purported enlargement of the power which does not exist. An invalid tax is not made valid by adding to it a valid tax. The invalidity of the bad tax, the want of power which made the tax bad, still remains.

If a tax on sale is invalid under the Constitution, then a tax on both manufacture and sale must of necessity be invalid.

## CONCLUSION

In conclusion, it is submitted that the imposition by the United States of the tax here involved did in fact burden the exercise by the City of Westfield of its police powers; that the imposition of such burden is prohibited by the Constitution, and that the Court, following its decision in the Panhandle case, should answer the question certified in the negative.

Respectfully submitted,

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